IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	**No. 19 MR 00014**
	)	**Michael P. Toomin**
	)	**Judge Presiding**

ORDER

Petitioner, Sheila O'Brien, seeks the appointment of a special prosecutor to reinstate and further prosecute the case of the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, to investigate the actions of any person or office involved in the investigation, prosecution and dismissal of that matter, and to also investigate the procedures of the Cook County State's Attorney's Office regarding charging decisions, bonds, deferred prosecutions and recusals. Respondent, Kim Foxx, State's Attorney of Cook County, denies that that the Smollett prosecution was compromised, impeded or undermined by any illegal or improper action and further contends that petitioner cannot meet the standards for appointment of a special prosecutor. Accordingly, respondent maintains the petition should be denied.

The issues have been joined by the pleadings and exhibits and following oral argument the matter was taken under advisement. The court will now address the merits of the petition.

BACKGROUND

The instant petition has its genesis in a story unique to the anals of the Criminal Court. The principal character, Jussie Smollett, is an acclaimed actor known to the public from his performances in the television series, "Empire." But his talents were not destined to be confined to that production. Rather, in perhaps the most prominent display of his acting potential, Smollett conceived a fantasy that propelled him from the role of a sympathetic victim of a vicious homophobic attack to that of a charlatan who fomented a hoax the equal of any twisted television intrigue.

Petitioner's factual allegations stem from a number of articles published in the Chicago Tribune, the Chicago Sun-times and other newspapers as well as local broadcasts, together with redacted Chicago Police Department reports and materials recently released by the State's Attorney's Office. Although the court recognizes that portions of these sources may contain hearsay rather than "facts" within the semblance of a trial record, the materials provide a backdrop for consideration of the legal issues raised by the petition.[1]

The story begins on January 22, 2019, when Smollett first sought the aid of the Chicago Police Department. Smollett reported that he was the recipient of an envelope delivered to the "Empire" studio on Chicago's West Side. Inside, was an unsettling note with letters apparently cut out from an unidentifiable publication, forming what appeared to be a racial and homophobic message that Smollett perceived as a threat. His fear was further heightened by the stick figure

[1] Hearsay is an out-of-court statement offered for the truth of the matter asserted therein, its value depending upon the credibility of the declarant. *People v. Murphy*, 157 Ill. App. 3d 115, 118, (1987); see also Ill. R. Evid. 801 (a)-(c) (eff. Jan. 1, 2011). Yet, certain of such statements may be admissible for other purposes (*People v. Davis*, 130 Ill. App. 3d 41, 53, (1984), including to simply show that a statement was made, to characterize an act, to show its effect on the listener, or to explain the steps in an investigation. See M. Graham, Graham's Handbook of Illinois Evidence § 801.5, at 763-78 (10th ed. 2010); and Ill. R. Evid. 803 and 804. Admissions and prior inconsistent statements, which appear prominently in the parties' submissions, are likewise not considered hearsay. Graham, §§ 801.9 and 801.14; and Ill. R. Evid. 801(d)(1), (2).

displayed on the note, holding a gun pointed at the figure's head. Additionally, the envelope contained a white powder substance that the police later determined to be aspirin.

A week later, on January 29, 2019, Smollett's production manager called 911 to report that Jussie had been attacked by two men outside a local sandwich shop at two o'clock that morning. Smollett, who is black and gay, later told the police he was physically attacked as he returned home from an early morning stop at the nearby Subway store. Smollett claimed that two masked men shouted homophobic and racial slurs, and as they beat him yelled "This is MAGA country." After looping a rope around his neck, the offenders who reportedly were white, poured "an unknown substance" on him before running away.

When news of the attack was released to the public, members of the United Sates Congress, television talk show hosts and other public figures expressed outrage. This included even the President of the United States who after viewing this story declared, "It doesn't get worse, as far as I'm concerned."

Acting on the belief that what had transpired was potentially a hate crime, the response of law enforcement was swift and certain. On the day following the attack, at least a dozen detectives combed hundreds of hours of surveillance camera footage in the area Smollett designated as the scene of the attack. None of the footage revealed anything resembling the attack. However, detectives did observe images of two people in the area, but their faces were indistinguishable.

As the investigation progressed the police began to focus on two brothers who soon came to be viewed as suspects. On February 13, 2019, as they returned from Nigeria, the brothers were taken into custody and questioned. The following day their apartment was searched.

Smollett's story then began to unravel. Detectives eventually concluded that he had lied about the attack. The investigation shifted to whether Smollett orchestrated the scenario, paying the Nigerians to stage the event. The police learned that both brothers had actually worked with Smollett at his television studio. Smollett had now become a suspect, well on his way to becoming an accused.

On February 21, 2019, in the early morning, Smollett turned himself in to custody at Chicago Police Headquarters where he was arrested and charged with filing a false police report, a form of disorderly conduct. The offense is a Class 4 felony, carrying a potential sentence of up to three years imprisonment. That same day, Police Superintendent, Eddie Johnson, held a press conference where he essentially confirmed what anonymous sources had been leaking to the media; that Smollett had staged the attack because he was dissatisfied with his "Empire" salary and that he had sent the threatening letter to himself.

On March 8, 2019, a Cook County grand jury indicted Smollett on 16 felony counts of disorderly conduct. A plea of not guilty was entered at his arraignment and the cause was continued to April 17, 2019. However, that date never materialized; rather, at an emergency court appearance on March 26, 2019, the case was *nolle prossed*, a disposition that shocked officialdom as well as the community. The State's Attorney's Office then issued the following statement:

> "After reviewing all the facts and circumstances of the case including Mr. Smollett's volunteer service in the community and his agreement to forfeit his bond to the City of Chicago, we believe the outcome is a just disposition and appropriate resolution of this case"

The State's Attorney's revelation was widely condemned. The secrecy shrouding the disposition prompted a backlash from both Superintendent Johnson as well as Mayor Rahm Emanuel, who derided the decision as a "whitewash of justice." President Trump again weighed in, announcing that the F.B.I and the Department of Justice would review the case, which he called "an embarrassment to our nation."

Internal documents recently released by the State's Attorney's Office and the Chicago Police Department contradict the impression that the sudden disposition was only recently conceived. In reality, negotiations extended back to February 26, 2019, a date close to the initial charges when First Assistant Magats wrote:

> "We can offer the diversion program and restitution. If we can't work something out, then we can indict him and go from there."

On February 28, 2019, the Chief of the Criminal Division, Risa Lanier, told detectives that they could no longer investigate the crime; she felt the case would be settled with Smollett paying $10,000 in restitution and doing community service. Although the detectives assumed the disposition would include a guilty plea, there was no admission of guilt or plea when the agreement was consummated. The public also found unsettling that the prosecutors had left open the question of Smollett's wrongdoing.

As with many unwinding plots, this case has a back story offering further insight into the workings behind the scenes. The details of that story became public over the course of the prosecution and was supplemented on May 31, 2019 through the release of reports, text messages and other internal documents released by the State's Attorney's Office and the Chicago Police Department and reported by the media.

On February 1, 2019, two days after Jussie Smollett reported his staged hate crime, State's Attorney Kim Foxx was contacted by Tina Tchen, a local attorney who previously served

as Michelle Obama's Chief of Staff. Tchen, a Smollett family friend, informed Foxx of the family's concern over the investigation and particularly, leaks from the police department to the media.

In turn, Foxx reached out to Superintendent Johnson, seeking to have the investigation taken over by the F.B.I. She later exchanged text messages with a member of the Smollett family who was grateful for Foxx's efforts.

The same day, Ms. Foxx discussed the likelihood of the F.B.I. taking over the investigation with her Chief Ethics Officer, April Perry. On February 3, 2019, Foxx told Perry to "impress upon them [the FBI] this is good." Perry later responded that she had spent 45 minutes giving her "best sales pitch" to the F.B.I., but they would likely want to hear more from Superintendent Johnson.

In another text, Ms. Foxx wondered if it was worth the effort and the transfer never materialized:

> "I don't want to waste any capital on a celebrity case that doesn't involve us. I'm just trying to move this along, since it's a distraction and people keep calling me."

On February 13, 2019, Foxx quietly announced that she was leaving the case. April Perry sent an internal email informing staff:

> "Please note that State's Attorney Foxx is recused from the investigation involving Jussie Smollett. First Assistant State's Attorney, Joe Magats is serving as the Acting State's Attorney for this matter."

Six days later, the recusal was confirmed by Foxx's spokewoman, Tandra Simonton:

> "Out of an abundance of caution, the decision to recuse herself was made to address potential questions of impropriety based upon familiarity with potential witnesses in the case."

Additionally, an ABC 7-I-Team press release recounted that Alan Spellberg, supervisor of the State's Attorney's Appeals Division, had sent a four-page memo to office brass indicating that the appointment of Magats was against legal precedent:

> "My conclusion from all of these authorities is that while the State's Attorney has the complete discretion to recuse herself from the matter, she cannot simply direct someone (even the First Assistant) to act in her stead"

Mounting questions over Foxx's withdrawal prompted various responses from her office. Foxx, they explained, did not legally recuse herself from the Smollett case; she did so only "colloquially." According to Foxx's spokewoman, Keira Ellis:

> "Foxx did not formally recuse herself or the [State's Attorney] Office based on any actual conflict of interest. As a result she did not have to seek the appointment of a special prosecutor"

The confusion continued, as well as the widespread doubt. On May 31, 2019, the State's Attorney added yet another explanation for her recusal:

> "False rumors circulated that I was related or somehow connected to the Smollett family, so I removed myself from all aspects of the investigation and prosecution…so as to avoid even the perception of a conflict."

ANALYSIS

Petitioner, Sheila O'Brien, seeks the appointment of a special prosecutor to reinstate and further prosecute the charges in the matter entitled the People of the State of Illinois v. Jussie Smollett, dismissed by the Cook County State's Attorney on March 26, 2019, and *inter alia,* to investigate the actions of any person or office involved in the investigation, prosecution and dismissal of that matter. Petitioner asserts that appointment of a special prosecutor is appropriate where, as here, the State's Attorney is unable to fulfill her duties, has an actual conflict of interest or has recused herself in the proceedings.

State's Attorney, Kim Foxx, denies that petitioner has the requisite standing to bring this action, Ms. Foxx further maintains that petitioner cannot meet the standard for the appointment of a special prosecutor as she had no actual in conflict in this case, and at no time filed a formal recusal motion as the law requires. Additionally, the State's Attorney posits that appointment of a special prosecutor would be duplicative of the inquiry she requested into her handling of the matter, currently being conducted by the Cook County Inspector General.

Any analysis must be prefaced by reference to governing legal principles. As a threshold matter it is generally recognized that section 3-9005 of the Counties Code, 55 ILCS 5/3-9005 (West 2018), cloaks the State's Attorney with the duty to commence and prosecute all actions, civil or criminal, in the circuit court for the county in which the people of the State or county may be concerned. *People v. Pankey*, 94 Ill. 2d 12, 16 (1983). As a member of the executive branch of government, the public prosecutor is vested with exclusive discretion in the initiation and management of a criminal prosecution. *People v. Novak,* 163 Ill. 2d 93, 113 (1994). Essentially, it is the responsibility of the State's Attorney to evaluate the evidence and other pertinent factors to determine what offenses, if any, can and should properly be charged. *People*

ex rel. Daley v. Moran, 94 Ill. 2d 41, 51 (1983).

It is well-settled that prosecutorial discretion is an essential component of our criminal justice system. As noted, the State's Attorney is cloaked with broad prosecutorial power in decisions to bring charges or decline prosecution. *Novak*, 163 Ill. 2d at 113. Control of criminal investigations is the prerogative of the executive branch, subject only to judicial intervention to protect rights. *Dellwood Farms, Inc. v. Cargill, Inc.,* 128 F. 3d 1122, 1125 (1997).

In derogation of these long-standing principles, our legislature has codified certain limitations on the powers and duties of our elected State's Attorneys. Thus, the current iteration of Section 3-9008 of the Counties Code, 55 ILCS 5/3-9008 (West 2018) provides in relevant parts:

> (a- 5) The court on its own motion, or an interested person in a cause or proceeding,...may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties. The court shall consider the petition, any documents filed in response, and ... If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-10) The court on its own motion, or an interested person in a cause or proceeding,...may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and... If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.
>
> (a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

This limitation upon the public prosecutor's statutory powers has endured for more than 170 years, providing the sole standards for determining when a State's Attorney should be disqualified from a particular cause or proceeding. See Laws 1847, §1, p. 18; *People v. Lang*, 346 Ill. App. 3d 677, 680 (2004). The abiding purpose of the enactment is to "prevent any influence upon the discharge of the duties of the State's Attorney by reason of personal interest." *In re Harris*, 335 Ill. App. 3d 517, 520 (2002), quoting *People v. Morley*, 287 Ill. App. 3d 499, 503-04 (1997). The term "interested" as used in the former statute was interpreted by our supreme court to mean that the State's Attorney must be interested as: (1) a private individual; or (2) an actual party to the action. *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 400-01 (1977).

Over time, the reach of Section 3-9008 was expanded to include situations in which the State's Attorney has a *per se* conflict of interest in the case. Guidance as to what may constitute a *per se* conflict may be found in an unbroken line of precedent. In *People v. Doss*, 382 Ill. 307 (1943) and *People v. Moretti*, 415 Ill. 398 (1953), where the State's Attorneys were potential witnesses before the grand jury, appointment of a special prosecutor was the regular and proper procedure to be followed. Likewise, in *Sommer v. Goetze*, 102 Ill. App. 3d 117 (1981), a special prosecutor was mandated in a civil proceeding where an assistant State's Attorney was both the complainant and key witness. See also *People v. Lanigan*, 353 Ill. App. 3d 422 (2004) (State's Attorney's representation of deputy sheriffs on their fee petitions contemporaneously with their prosecution created a *per se* conflict of interest).

Prevailing precedent dictates that the decision to appoint a special prosecutor under section 3-9008 is not mandatory, but rather within the sound discretion of the circuit court. *In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 232, (2009); *Harris*, 335 Ill. App. 3d at

520 and *People v. Arrington*, 297 Ill. App. 3d 1, 3 (1998). Even where a disqualifying ground is found, "the appointment of a special state's attorney is not mandatory, the statute only requiring that such an appointment may be made." *Lanigan*, 353 Ill. App. 3d at 429-30, quoting *Sommer*, 102 Ill. App. 3d at 120.

Moreover, the authority of a special state's attorney is strictly limited to the special matter for which he was appointed. *Franzen v. Birkett* (*In re Special State's Attorney*, 305 Ill. App. 3d 749, 761 (1999). His powers are restricted to those causes or proceedings in which the State's Attorney is disqualified. ("As to all other matters the State's Attorney continues to exercise all of the duties and enjoys all of the emoluments of his office.") *Aiken v. County of Will*, 321 Ill. App. 171, 178 (1943). Additionally, the appointment of a special prosecutor is appropriate only where the petitioner pleads and proves specific facts showing that the State's Attorney would not zealously represent the People in a given case. *Harris*, 335 Ill. App. 3d at 522, citing *Baxter v. Peterlin*, 156 Ill. App. 3d 564, 566 (1987).

Standing to seek appointment of a special prosecutor may also be at issue. Under two provisions of the current statute, commencement of actions to disqualify the State's Attorney are limited to motions brought by the court or by an interested person in a cause or proceeding. Section 3-9008 (a-5) and (a-10).

The issue was earlier addressed by our supreme court in *People v. Howarth*, 415 Ill. 499, 513 (1953), where the court concluded that citizens associated with the Good Government Council could properly invoke the court's jurisdiction. See also, *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 502 (1910), where the court recognized that "the filing of a petition by the State's attorney setting up facts... to appoint a special State's attorney gave the court jurisdiction of the subject matter...." Similarly, in *People ex rel. Baughman v. Eaton*, 24 Ill. App. 3d 833, 834 (1974), the Fourth District found it was appropriate for a private

citizen to seek a special prosecutor to call the court's attention to circumstances that may warrant that appointment. Nor is it necessary that a private citizen petitioning to invoke the disqualification statute be a party to the action. *In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 229 (2009); *Franzen*, 305 Ill. App. 3d at 758.

With these principles in mind, consideration will be given to the merits of the case at hand. Petitioner first asserts that she is an "interested person" within the purview of Section 3-9008 by reason of her professional background and personal attributes. As a member of the judiciary from 1985 to 2011, petitioner alleges that she has sustained personal harm from the derogatory manner in which the Smollett case was handled; that she and all residents of the community have been subjected to ridicule and disparaging media commentary to the extent that her ability to live peacefully has been diminished.

The State's Attorney denies that petitioner's status as a taxpayer and active member of her community is sufficient to confer standing. Rather, petitioner is merely a casual observer who should not be allowed to invoke the jurisdiction of Section 3-9008 absent some showing of particular pecuniary interest to intervene.

Although the State's Attorney's argument has a degree of merit, the authorities previously discussed do not foreclose the application of petitioner's personal attributes and feelings in determining her status as an interested person. There is no requirement that she be a party to the action nor need she have any financial interest in this cause. Her assertion of standing will be sustained.

Petitioner next contends that State's Attorney Foxx was unable to fulfill her duties in the Smollett case because Foxx's recusal indicated her acknowledgement of a potential conflict of interest stemming from her "familiarity with potential witnesses in the case." Petitioner's argument appears to be grounded on the first basis for appointment of a special prosecutor

providing that an interested person in a cause or proceeding may file a petition where the State's Attorney is sick, absent or unable to fulfill his or her duties. 55 ILCS 5/3-9008 (a-5).

An identical argument was recently rejected in In re Appointment of Special Prosecutor (Emmett Farmer), 2019 IL. App. (1st) 173173, where the First District determined that subsection (a-5) is limited to situations where the State's Attorney is physically unable to perform due to sickness, absence or similar circumstances beyond her control:

> "By grouping 'sick, absent or unable to fulfill his or her duties' together in subsection (a-5), the legislature indicated that the inability to fulfill one's duties is of a kind with sickness and absence" ¶28

Accordingly, petitioner's argument on subsection (a-5) must fail.

In her second ground of disqualification, petitioner submits that Ms. Foxx's use of the word "recuse" reflects her subjective belief that "she had a conflict with prosecuting Jussie Smollett and thus was unable to perform her duties as defined." Although the existence of an actual conflict of interest is indeed a recognized ground of disqualification under subsection (a-10), petitioner essentially fails to plead and prove specific facts identifying the interest or the conflict.

In petitioner's "Fact Timeline" one might perhaps discern that the conflicting interest of which petitioner speaks was a manifest desire to aid and assist Mr. Smollett. If so, adherence to that motive would certainly intersect with and be in derogation of the State's Attorney's statutory duties and responsibilities. Petitioner's Timeline, together with other facts established during the course of the proceedings, might offer some support for a claim of interest. First, Ms. Foxx's receipt of text messages requesting her assistance when Smollett was a purported victim in the early stages of the case, coupled with the series of conversations with Smollett's family could be indicative of a desire to help. Likewise, Foxx's request that Police Superintendent, Eddie

Johnson facilitate the transfer of the case to the F.B.I. could manifest a desire to aid. Again, after Smollett had been indicted, Foxx's approval of the dismissal on an unscheduled court date in return for the favorable disposition Smollett received might also be indicative of bias. Finally, Foxx's public statements, first upholding the strength of the State's case, then justifying the agreement because the evidence turned out to be weaker than was initially presented were additional factors showing favor.

Although petitioner's allegations raise some disquieting concerns they do not rise to a clear showing of interest. To be sure, other facts such as the initial charging of Smollett, the engagement of the grand jury, the return of the indictment, the arraignment and ongoing prosecution of Smollett are opposing facts that tend to undermine a claim of interest. Petitioner has failed to show the existence of an actual conflict of interest in the Smollett proceeding.

Finally, petitioner posits that this court must appoint a special prosecutor because Kim Foxx recused herself in the Smollett case. Petitioner grounds this assertion on staff's public statement on February 19, 2019 that Foxx had decided to recuse herself "out of an abundance of caution" because of her "familiarity with potential witnesses in the case." The announcement mirrored the internal acknowledgement, of February 13, 2019 that Foxx "is recused" from the Smollett investigations.

Although the statutory authority relied upon by Ms. Foxx was not articulated, a reasonable assumption exists that it was bottomed on subsection 3-9003 (a-15), authority for the proposition that permissive recusals can be invoked by the State's Attorney for "any other reason he or she deems appropriate." However, Foxx did not file a petition for recusal, nor did she alert the court of her recusal, thereby depriving the court of notice that appointment of a special prosecutor was mandated. Instead, she simply turned the Smollett case over to her First Assistant, Joseph Magats. As will be shown, her ability to bypass the mandate of the statute was

in opposition to well-established authority.

Curiously, public announcements that flowed from the State's Attorney's Office offered the rather novel view that the recusal was not actually a recusal. Rather, in an exercise of creative lawyering, staff opined that Foxx did not formally recuse herself *in a legal sense*; that the recusal was only in a *colloquial sense*. Under that rubric, Foxx could carry on as public prosecutor, unhampered by her contradictory statements. However, discerning members of the public have come to realize that the "recusal that really wasn't" was purely an exercise in sophistry. In this regard, the court takes judicial notice of the recently released memo penned by Chief Ethics Officer, April Perry, under the title, State's Attorney Recusal, dated February 13, 2019:

> "Please note that State's Attorney Kim Foxx is recused from the investigation involving victim Jussie Smollett. First Assistant Joe Magats is serving as the Acting State's Attorney for this matter.

Experience confirms that the term "recusal" is most often used to signify a voluntary action to remove oneself as a judge. Black's Law Dictionary, 4th Ed. p.1442 (1951). However, recusals are not the sole province of the judiciary, but may be invoked by most public officials. Thus, recusals are a species of the disqualification process courts typically encounter in processing motions for substitution of judges or change of venue. In *Brzowski v. Brzowski*, 2014 IL. App. 3d 130404, the Third District held that the same rules should apply when a judge is disqualified from a case, either by recusal or through a petition for substitution:

> "...it is a generally accepted rule in both state and federal courts that once a judge recuses, that judge should have no further involvement in the case outside of certain ministerial acts." ¶19.

A review of the record confirms our understanding that what was intended by Ms. Foxx,

and what indeed occurred, was an unconditional legal recusal. Her voluntary act evinced a relinquishment of any future standing or authority over the Smollett proceeding. Essentially, she announced that she was giving up all of the authority or power she possessed as the duly elected chief prosecutor; she was no longer involved.

The procedure invoked by the State's Attorney necessarily raises problematic concerns. Particularly so, as they relate to the prosecution of Jussie Smollett and the ultimate disposition of his case. Under subsection 3-9008 (a-15), there is no doubt Ms. Foxx was vested with the authority to recuse herself from any cause or proceeding for "any other reason" than those enumerated in subsection (a-5) and (a-10). Notably, this statutory grant appearing as it does in the Counties Code, is the sole legislative authority that enables a duly elected State's Attorney to voluntarily step down from a particular case for any reason.

Given Ms. Foxx's earlier involvement with the Smollett family when Jussie occupied the status of victim, her decision to recuse was understandable. But once that decision became a reality, section 3-9008 was the only road she could traverse and that statute unequivocally requires that a special prosecutor be appointed by the court. Yet, for reasons undisclosed even to this day, Foxx instead chose to detour from that mandated course, instead appointing Mr. Magats as "the Acting State's Attorney for this matter."

The State's Attorney's decision not only had far reaching consequences but also, quite likely, unintended results. Not because of her choice of Joe Magats, an experienced and capable prosecutor, but rather because his appointment was to an entity that did not exist. There was and is no legally cognizable office of Acting State's Attorney known to our statutes or to the common law. Its existence was only in the eye or imagination of its creator, Kim Foxx. But, she was possessed of no authority, constitutionally or statutorily, to create that office. That authority reposes solely in the Cook County Board pursuant to section 4-2003 of the Counties Code, 55

ILCS 5/4-2003 (2018), *People v. Jennings*, 343 Ill. App. 3d 717, 724 (2003), *People ex rel. Livers v. Hanson*, 290 Ill. 370, 373 (1919).

The State's Attorney is a constitutional officer, (Ill. Const. 1970, Art. 6, §19). Although reposing in the judicial article, the office is a part of the executive branch of State Government and the powers exercised by that office are executive powers. *People v. Vaughn*, 49 Ill. App. 3d 37, 39 (1977);

It is axiomatic that the State's Attorney is endowed with considerable authority under the Counties Code, 55 ILCS 5/3-9005 (a) (West 2018), yet none of the 13 enumerated powers and duties vests her with the power to create subordinate offices or to appoint prosecutors following disqualification or recusal. Pursuant to the statute, in addition to those enumerated duties, the State's Attorney has the power:

> 1) To appoint special investigators to serve subpoenas, make returns... and conduct and make investigations which assist the State's Attorney. 55 ILCS 5/3-9005(b);
>
> 2) To secure information concerning putative fathers and non-custodial parents for the purpose of establishing...paternity or modifying support obligation; 55 ILCS 5/3-9005 (c);
>
> 3) To seek appropriations.... for the purpose of providing assistance in the prosecution of capital cases...in post-conviction proceedings and in ...petitions filed under section 2-1401 of the Code of Civil Procedure. 55 ILCS 5/3-9005(d); and,
>
> 4) To enter into ...agreements with the Department of Revenue for pursuit of civil liabilities under the Illinois Criminal Code. 55 ILCS 5/3-9005 (e).

Nor do decisions of our reviewing courts offer any hint of approval for the unprecedented exercise of power witnessed in the Smollett prosecution. Rather, attention is directed to a series

of cases arising from the practice in downstate counties whereby agency attorneys appeared to assist county prosecutors in specific cases pursuant to section 4-01 of the State's Attorneys Appellate Prosecutors Act, 725 ILCS 210/4.01 (West 2018). Indeed, this was a common practice in counties containing less than 3,000,000 inhabitants. In each instance, the common thread connecting the cases involved appearances on crimes not specifically enumerated in the enabling Act, coupled with the absence of court orders authorizing the appointments mandated under 55 ILCS 5/3-9008.

In *People v. Jennings*, 343 Ill. App. 3d 717 (2003), the record showed that appointed counsel actually displaced the elected State's Attorney, with total responsibility for the prosecution. Counsel acted pursuant to the State's Attorney's order naming him as a special assistant State's Attorney and an oath of office was taken. Yet, no order was entered by the trial court appointing him as a duly authorized prosecutor in the case. In disapproving this procedure, the *Jennings* court stated: "This type of appointment cannot be condoned. State's Attorneys are clearly not meant to have such unbridled authority in the appointment of special prosecutors." *Jennings*, 343 Ill. App. 3d at 724.

Similarly, in *People v. Woodall*, 333 Ill. App. 3d 1146 (2002), the court having found no legitimate basis for any of the agency attorneys to conduct the prosecution on the State's behalf cautioned:

> "The use of special assistants is limited by statute. They can be appointed by circuit court order only after a judicial determination that the elected State's Attorney is 'sick or absent, or [is] unable to attend, or is interested in any cause or proceeding' 55 ILCS 5/3-9008 (West 1998)." *Woodall*, 333 Ill. App. 3d at 1154

The *Woodall* court was also troubled by the State's Attorneys effrontery in professing they were at liberty to create the assistant State's Attorney positions in derogation of the

authority of the County Board:

> The position of "special assistant State's Attorney" is a position unknown to our laws. The State asks us to recognize an appointment process that would create a new hybrid office, an assistant State's Attorney who is special in several ways, but not in the way that the adjective 'special' normally defines the office of special prosecutor...the assistant would hold a special position never authorized by the county board." See 55 ILCS 5/4-2003 (West 1998)." *Woodall*, 333 Ill. App. 3d at 1153-54.

Earlier, in *People v. Ward*, 326 Ill. App. 3d 897 (2002), the Fifth District sounded the death knell for prosecutions conducted by attorneys who lacked legitimacy:

> "If a case is not prosecuted by an attorney properly acting as an assistant State's Attorney, the prosecution is void and the cause should be remanded so that it can be brought by a proper prosecutor. *Ward*, 326 Ill. App. 3d at 902

The specter of a void prosecution is surely not confined to *Ward*. Our jurisprudence speaks to many cases, civil and criminal, where the nullity or voidness rule has caused judgements to be vacated on collateral review. Most prominent perhaps are challenges directed to the standing of unlicensed attorneys to attend or conduct the proceedings. For example, In *People v. Munson*, 319 Ill. 596 (1925), the supreme court considered the effect of participation in the securing of an indictment by one elected as State's Attorney but not licensed to practice law. In quashing the indictment, the court reasoned:

> "If one unauthorized to practice law or appear in courts of record may assist the grand jury in returning an indictment merely because he has been elected to the office of State's Attorney, no reason is seen why one not so elected and not otherwise qualified may not do the same. *Munson*, 319 Ill. App. 3d at 605."

An identical result obtained in *People v Dunson*, 316 Ill. App. 3d 760 (2000), where the defendant, who was prosecuted by an unlicensed attorney, sought post-conviction relief from two disorderly conduct convictions. Although the court recognized the prejudice that inured to the

defendant, it likewise condemned the deception practiced upon the court and upon the public. Relying on *Munson*, the court held that "the participation in the trial by a prosecuting assistant State's Attorney who was not licensed to practice law under the laws of Illinois requires that the trial be deemed null and void *ab initio* and that the resulting final judgment is also void" *Dunson*, 316 Ill. App. 3d at 770.

CONCLUSION

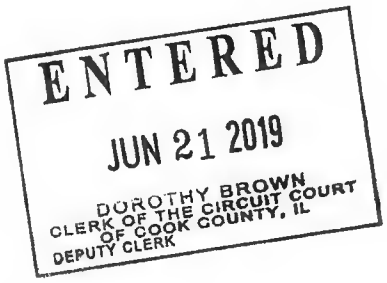
In summary, Jussie Smollett's case is truly unique among the countless prosecutions heard in this building. A case that purported to have been brought and supervised by a prosecutor serving in the stead of our duty elected State's Attorney, who in fact was appointed to a fictitious office having no legal existence. It is also a case that deviated from the statutory mandate requiring the appointment of a special prosecutor in cases where the State's Attorney is recused. And finally, it is a case where based upon similar factual scenarios, resulting dispositions and judgments have been deemed void and held for naught.

Here, the ship of the State ventured from its protected harbor without the guiding hand of its captain. There was no master on the bridge to guide the ship as it floundered through unchartered waters. And it ultimately lost its bearings. As with that ship, in the case at hand:

> There was no duly elected State's Attorney when Jussie Smollett was arrested;
>
> There was no State's Attorney when Smollett was initially charged;
>
> There was no State's Attorney when Smollett's case was presented to the grand jury, nor when he was indicted;
>
> There was no State's Attorney when Smollett was arraigned and entered his plea of not guilty; and
>
> There was no State's Attorney in the courtroom when the proceedings were *nolle prossed.*

Adherence to the long-standing principles discussed herein mandates that a special prosecutor be appointed to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected.

Although disqualification of the duly elected State's Attorney necessarily impacts constitutional concerns, the unprecedented irregularities identified in this case warrants the appointment of independent counsel to restore the public's confidence in the integrity of our criminal justice system.



ENTERED: _____
Michael P. Toomin,
Judge of the
Circuit Court of Cook County

DATE: June 21, 2019

Adherence to the long-standing principles discussed herein mandates that a special prosecutor be appointed to conduct an independent investigation of the actions of any person or office involved in all aspects of the case entitled the People of the State of Illinois v. Jussie Smollett, No. 19 CR 0310401, and if reasonable grounds exist to further prosecute Smollett, in the interest of justice the special prosecutor may take such action as may be appropriate to effectuate that result. Additionally, in the event the investigation establishes reasonable grounds to believe that any other criminal offense was committed in the course of the Smollett matter, the special prosecutor may commence the prosecution of any crime as may be suspected.

Although disqualification of the duly elected State's Attorney necessarily impacts constitutional concerns, the unprecedented irregularities identified in this case warrants the appointment of independent counsel to restore the public's confidence in the integrity of our criminal justice system.

ENTERED: _____
Michael P. Toomin,
Judge of the
Circuit Court of Cook County

DATE: June 21, 2019